

Wells Fargo Bank, N.A. v Burke
2015 NY Slip Op 32796(U)
June 1, 2015
Supreme Court, Nassau County
Docket Number: 11601/14
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X TRIAL/IAS PART 15

WELLS FARGO BANK, N.A., Successor by Merger to Wells Fargo Bank Minnesota, N.A. as Trustee f/k/a Norwest Bank Minnesota, N.A. as Trustee for Delta Funding Home Equity Loan Trust 1997-3,
Plaintiff(s),

INDEX # 11601/14
Mot. Seq. 1
Mot. Date 3.26.15
Submit Date 3.26.15

-against-

WILLIAM P. BURKE, JR., SUSAN C. BURKE, THE FIRST NATIONAL BANK OF LONG ISLAND, CAPITAL ONE BANK USA N.A., MIDLAND CREDIT MANAGEMENT INC., SPERRY EMPLOYEES & FINANCE, CREATIVE LEASING & FUNDING CO., INC., FORD MOTOR CREDIT CO., JEFFREY S. SCHECTER & ASSOCIATES, P.C., UNITED STATES OF AMERICA, PEOPLE OF THE STATE OF NEW YORK, NYS DEPARTMENT OF TAXATION AND FINANCE, MARK ALLOY, "JOHN DOE#1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendant(s).

The following papers were read on this motion:

Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

[* 2]

Motion pursuant to CPLR 32111(a)(5) and (a)(7) and CPLR 3212 by defendants William P. Burke and Susan C. Burke (Burke defendants) to dismiss the complaint is decided as provided herein.

In this action, plaintiff Wells Fargo, N.A. (Wells Fargo) seeks a judgment declaring that it has an equitable mortgage against real property owned by the Burke defendants known as 27 Weir Lane, Lattingtown, New York (Section 30, Block 66, Lot 25), which was purchased by the Burkes in or about June 22, 1983. Thereafter, on or about June 17, 1997, said defendants executed a mortgage on the property in the amount of \$370,000. The mortgage was assigned by non-party Delta Funding Corporation, the original mortgagee and plaintiff's remote predecessor in interest, to Wells Fargo on or about May 8, 2002. They defaulted under the terms of the mortgage in or about June 1998.

By order of the Hon. Thomas A. Adams entered May 21, 2012, the third foreclosure action (Index No. 12215/11) regarding the Burke mortgage was dismissed and the mortgage declared null and void. By way of historical background, Justice Adams noted that the action was

“the third in a series of legal proceedings directed toward the issuance of a Judgment of Foreclosure and Sale. The initial action, assigned Index Number 23395/99, was commenced by filing on January 20, 1999 and dismissed pursuant to CPLR 3216. (*See*, SFO 3/11/04). The next action, assigned Index Number 5958/05, was initiated more than six years subsequent to the commencement of the prior proceeding and more than a year following the former's dismissal. Joinder of issue ensued in early June on 2005, and it does not appear to have progressed beyond the pleading stage. Clearly, that matter has lain fallow for years on end. The action *sub judice*, assigned Index Number 12215/11, followed more than six years later.”¹

Based on the theories of equitable subrogation and unjust enrichment, plaintiff seeks to establish an equitable mortgage/lien on the subject property contending that the Burke defendants received funds in the amount of \$370,000, which they used to eliminate substantial liens against the Lattingtown property totaling \$350,633.07 (Exhibit C, Plaintiffs' Opposition to Motion to Dismiss). Moreover, from the date of their default under the terms of the now declared “null and void” mortgage, i.e., June 1998 until January 31, 2014, \$187,354.94 has allegedly been paid towards taxes and insurance for the Lattingtown property. At the time the instant action was commenced, the Burke defendants allegedly owed \$374,230.80 on the loan.

¹It appears that none of the dismissals referenced by the Hon. Thomas A. Adams was a dismissal on the merits or with prejudice.

The Burke defendants seek dismissal of the complaint on the grounds that plaintiff has failed to state a cause of action for the imposition of an equitable mortgage/equitable lien which claim, in any event, is barred on statute of limitations, *res judicata* and collateral estoppel grounds. Moreover, plaintiff's claim for unjust enrichment is similarly barred by the statute of limitations grounds and the doctrine of unclean hands.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept the facts alleged as true and accord plaintiff the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). It is well established that summary judgment may only be granted where the moving party demonstrates the absence of the existence of any triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A failure to make such a showing requires denial of the motion regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

The threshold issue in any claim for equitable relief, including an action seeking imposition of an equitable mortgage, is whether relief in equity is warranted or whether plaintiff has an adequate remedy at law (*Boyle v Kelley*, 42 NY2d 88, 91 [1977]). Here, the imposition of an equitable mortgage is plaintiff Wells Fargo's sole remedy.

With respect to the statute of limitations, the Burke defendants argue that the instant action was commenced in or about December 2014, more than 16 years after the original lender elected to accelerate the mortgage and more than 15 years after the first foreclosure action was commenced.

To state a cause of action for unjust enrichment, a plaintiff must demonstrate "that defendants were enriched, at plaintiff's expense, and that "it is against equity and good conscience to permit [defendants] to retain what is sought to be recovered" [citations omitted] (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2001]; *Farina v Bastianich*, 116 AD3d 546, 548 [1st Dept 2014]). The limitations period for unjust enrichment is six years from the occurrence of the wrongful acts giving rise to duty of restitution and, as a claim in equity, the same period applies to a cause of action seeking an equitable mortgage (*U.S. Bank N.A. v Gestetner*, 103 AD3d 962, 963 [3d Dept 2013]; *Elliott v Qwest Communications Corp.*, 25 AD3d 897 [3d Dept 2006]).

Notwithstanding the Burke defendants' assertions to the contrary, affording the complaint a liberal reading, and considering the procedural posture of the case, the allegations of the complaint are sufficient to make out a claim for the imposition of an equitable mortgage/equitable lien and unjust enrichment. These remedies are not time barred and plaintiff is not barred by the doctrine of collateral estoppel, *res judicata* or unclean hands from asserting them.

Although plaintiff Wells Fargo commenced this action more than six years after acceleration of the mortgage debt by written demand in September 1998, commencement of the initial foreclosure action in January of 1999, and commencement of the second proceeding in April 2005 (see Exhibit 8, Motion to Dismiss), the commencement of the instant action to impose an equitable mortgage/lien is timely given that the remedy did not become available to plaintiff until May 21, 2012 when the mortgage on which the plaintiff originally sued was declared null and void by the order of the Hon. Thomas A. Adams.

A cause of action seeking to establish an equitable mortgage requires proof of “the existence of a clear intent between the parties that certain property be held, given or transferred as security for an obligation” (*New York TRW Tit. Ins. v Wade's Can. Inn & Cocktail Lounge, Inc.*, 199 AD2d 661, 664 [3d Dept 1993] [internal quotation marks and citations omitted]). The court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation, and an intention to create such a charge is clear from the language employed and the attendant circumstances (*Tornatore v Bruno*, 12 AD3d 1115, 1117-1118 [4th Dept 2004] [internal quotation marks and citations omitted]). Here, such proof of intent arises directly from the indisputable fact of the Burke defendants' acceptance of the proceeds of a loan in the amount of \$370,000 for which they offered premises known as 27 Weir Lane, Lattingtown, New York as security.

“Rooted in equity, the purpose of the subrogation doctrine, is to afford a person who pays a debt that is owed primarily by someone else, every opportunity to be reimbursed in full” (*Chemical Bank v Melzer*, 93 NY2d 296, 304 [1999]), thereby avoiding the unjust enrichment of the person whose debt is paid (*Harris v Thompson*, 117 AD3d 791, 793 [2d Dept 2014]). A claim for equitable subrogation is, therefore, a mechanism by which the law of restitution and unjust enrichment will reallocate the burden of a given liability from one who has originally discharged it to another whom the law considers more appropriate to bear it (*King v Pelkofski*, 20 NY2d 326, 333 [1967]).

With respect to the third cause of action for unjust enrichment, the Burke defendants maintain that effective September 3, 2004, plaintiff lost its right to foreclose and enforce its mortgage lien on the Burke's home. Therefore, they argue that any payments made by plaintiff toward real estate taxes and insurance after expiration of the statute of limitations in 2004 were, therefore, purely voluntary in an attempt to increase plaintiff Wells Fargo's claim for damages. The Burke defendants maintain that such payments were not required by the underlying mortgage or otherwise legally justified. At this juncture, plaintiff's allegations that the Burke defendants were unjustly enriched at plaintiff Wells Fargo's expense for, at the very least, the last six years, are sufficient to withstand defendants' dismissal motion.

The doctrine of *res judicata* operates to preclude the reconsideration of claims actually litigated and resolved in a prior proceeding, as well as claims for different relief against the same party which arise out of the same factual grouping or transaction, and which should have or could have been resolved in the prior proceeding (*Mahler v Campagna*, 60 AD3d 1009, 1011 [2d Dept 2009]). While it is undisputed that a final judgment is conclusive of all claims related to, or dependent upon, the claim disposed of (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]), and that a party to that litigation or in privity with a party thereto is collaterally estopped from relitigating a previously resolved issue where the party in the earlier litigation was afforded a full and fair opportunity to contest the decision (*Westchester County Correction Officers Benev. Assoc. Inc. v County of Westchester*, 65 AD3d 1226, 1227 [2d Dept 2009]), the instant action seeks to establish an equitable mortgage/equitable lien, distinct from the original written mortgage, and is based in equity and on facts different from those asserted in the prior foreclosure actions.

The Burke defendants have failed to meet their burden of establishing that issues identical to those herein were decided in a prior action and are determinative in the present action (*Mahler v Campagna*, *supra* at p. 1011). As such, the instant action is not barred by the statute of limitations or the doctrine of judicial estoppel. It does not appear from the papers submitted to the court that there has been any determination on the merits, in a prior action, *vis-a-vis* plaintiff's equitable claims.

Under the fact alleged herein by plaintiff, the Burke defendants' reliance on the doctrine of unclean hands is unavailing. The doctrine is inapplicable unless the party against whom it is invoked is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1966]).

The Burke defendants have failed to allege any manner in which plaintiff Wells Fargo is guilty of immoral or unconscionable conduct (*Cashel v Cashel*, 94 AD3d 684, 689 [2d Dept 2012] [quotation marks and citations omitted]) sufficient to support a claim of unclean hands.

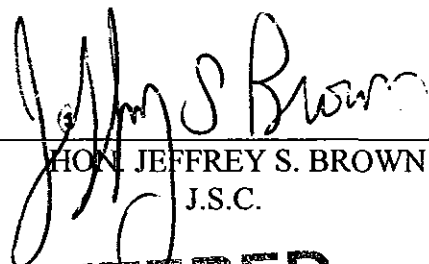
Accordingly, the motion by the Burke defendants to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(7) and CPLR 3212 is **denied**.

Defendants' request to vacate the notice of pendency filed against the Lattingtown premises is **denied**.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
June 1, 2015

ENTER:



HON. JEFFREY S. BROWN
J.S.C.
ENTERED

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